

April 28, 2023

*Via Email*

California Regional Water Quality Control  
Board, Central Coast Region  
c/o Site Cleanup Program  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401  
Email: dean.thomas@waterboards.ca.gov

**Re: February 16, 2023 Draft Cleanup and Abatement Order No. R3-2023-00XX  
Issued to the County of San Luis Obispo and California Department of  
Forestry and Fire Protection**

Dear Mr. Thomas:

On behalf of the California Department of Forestry and Fire Protection (“CAL FIRE”), this letter responds to the Draft Cleanup and Abatement Order No. R3-2023-00XX (“Draft CAO”) issued by the California Regional Water Quality Control Board, Central Coast Region (“Regional Board”) on February 16, 2023. If finalized and adopted by the Regional Board, the Draft CAO would direct CAL FIRE and the County of San Luis Obispo (“County”) to provide or pay for replacement water, conduct public outreach, investigate, clean up, and abate per- and polyfluoroalkyl substances (“PFAS”) in soil, soil gas, sediment, groundwater, and certain water supply wells near the San Luis Obispo County Regional Airport (“Airport”).

As set forth below, legal defenses, evidentiary ambiguities and inaccuracies, and the parties’ progress in addressing issues and concerns render issuance of the CAO inappropriate. Rather than issue the CAO or otherwise initiate enforcement proceedings, CAL FIRE urges the Regional Board to continue collaborating with CAL FIRE and the County on their current public health response.

## INTRODUCTION

CAL FIRE supports the Regional Board’s goal of ensuring that residents and businesses near the Airport have access to safe drinking water. Since March 2019, when the State Water Resources Control Board (“State Board”) issued Order WQ 2019-0005-DWQ requiring owners of airports to investigate and prepare technical reports concerning the potential presence of PFAS in soil and groundwater near suspected PFAS sources, the County has cooperated extensively

with the Regional Board to investigate the presence of PFAS at the Airport and the potential impacts on groundwater and nearby water supply wells.

The County conducted the first airport sampling in the Central Coast region, and the County's response and compliance have entailed collection of more than 170 soil/sediment samples, almost 100 groundwater investigation samples, and more than 200 water samples from private wells/water systems as part of the ongoing work investigating and addressing PFAS associated with Airport operations.

CAL FIRE has supported the County's efforts and continues to work cooperatively with the County to investigate and address public health issues related to the presence of PFAS at or near the Airport. Even before the Regional Board issued the Draft CAO, CAL FIRE and the County were working together to address concerns, including providing replacement water to users of the only two private wells where samples of drinking water recently reflected concentrations of PFAS exceeding one or more of the relevant Response Levels ("RLs").

CAL FIRE shares the Regional Board's goal of protecting public health, but the Draft CAO fails to acknowledge legal defenses, and suffers from legal flaws, ambiguities, and inaccuracies that present obstacles to accomplishing those goals:

- First, in these circumstances, the Regional Board may lack the legal authority to issue the CAO. The presence of PFAS in the soil and groundwater at the Airport is the sole result of CAL FIRE and the County's compliance with Federal Aviation Administration ("FAA") regulations that require the use of aqueous film forming foam ("AFFF"), a fire suppressant foam that contains PFAS, for fire-fighting and annual training at airports. *See* 14 CFR § 139.317. The required use of AFFF under federal law preempts the Regional Board's authority to impose liability on CAL FIRE and the County for complying with such federal law. Separately, California law provides public entities like CAL FIRE and the County with immunity from liability resulting from fire protection or fire-fighting equipment or facilities. *See* Cal. Gov't Code §§ 850.4, *et seq.* Accordingly, both federal and state law preclude the issuance of the CAO against CAL FIRE and the County.
- Second, the CAO contains ambiguities and inaccuracies that undermine the evidentiary and legal basis for the Draft CAO, as well as threatening to further complicate and delay the County and CAL FIRE's public health response. The resulting lack of clarity in the Draft CAO may mislead or limit public understanding of the current public health conditions and the status of the County and CAL FIRE's response.

Rather than issuing the CAO and potentially proceeding through an enforcement action, CAL FIRE urges the Regional Board to continue to collaborate with the County and CAL FIRE on the current public health response already underway.

**I. Federal and State Law Preclude the Regional Board from Imposing Liability on CAL FIRE and the County for Providing Fire-Fighting Services in Compliance with Federal Law.**

The Draft CAO acknowledges that the sole source of PFAS at issue (and thus the sole indicator of CAL FIRE and the County's alleged liability) is the use of AFFF in fire-fighting preparedness and fire-fighting operations at the Airport. Draft CAO ¶¶ 19-20. However, federal law mandated the use AFFF at the Airport for such fire-fighting activities, training, and preparation.<sup>1</sup> Additionally, California law provides immunity to public entities like CAL FIRE and the County for such fire-fighting-related activities. The Draft CAO fails to acknowledge the FAA regulations that required the use of AFFF at the Airport, and it likewise fails to acknowledge this immunity for public entities under state law, that preclude the imposition of liability on CAL FIRE and the County.<sup>2</sup>

**A. Established Principles of Preemption Prohibit the Imposition of Liability on CAL FIRE and the County for Their Compliance with Federal Law Requiring the Use of AFFF at the Airport.**

Federal conflict preemption principles prohibit the enforcement of state law where complying with both federal and state law is impossible, or where the state law stands as an obstacle to the accomplishment of Congress's objectives. *See Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978). This principle extends to state laws that "interfere[] with the methods" employed by federal law to reach Congress' goal. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). When such a conflict arises, courts have repeatedly recognized that the "conflicting aspects" of the state law "must stand aside." *Restore Hetch Hetchy v. City & Cnty. of San Francisco*, 25 Cal. App. 5th 865, 880 (2018). This is even true where fundamental state laws are implicated, like California's prohibition against the unreasonable use of water set forth in the California Constitution. *See id.* at 880-82 (holding that Congress's intent in granting San Francisco a right-of-way to construct Hetch Hetchy Reservoir preempted a claim that the dam constituted an unreasonable method of diverting water under article X, section 2 of the California Constitution).

The United States Supreme Court has upheld the dismissal of attempts to impose liability under state law for actions taken in compliance with federal regulations. For example, the Supreme Court held in *Geier v. American Honda Motor Company* that an auto manufacturer's

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<sup>1</sup> Although Congress directed the FAA in 2018 to amend its regulations to allow airports to use PFAS-free fire-fighting foams, the FAA has not yet promulgated regulations that permit the use of foams that do not contain PFAS. Beginning in 2019, the FAA authorized testing procedures and equipment that do not require the actual dispersal of AFFF in training and testing operations (which procedures have been adopted at the Airport), but federal regulations still require the storage and use of AFFF containing PFAS for fire-fighting at the Airport.

<sup>2</sup> The Draft CAO also lacks legal support for (1) identifying CAL FIRE as a "discharger" of "waste" under the California Water Code given that AFFF was required to be used at the Airport, and (2) failing to comply with federal and state due process requirements.

compliance with federal vehicle safety regulations, requiring manufacturers to equip vehicles with one of several passive restraint options, preempted state common law tort liability for injuries resulting from such compliance. *See* 529 U.S. 861, 864-65 (2000). There, state law conflicted with federal regulations because it sought to hold the manufacturer liable for failing to install airbags when federal law authorized the use of other passive restraint systems, such as automatic seat belts. *Id.* at 881. Allowing state law liability for actions that complied with federal regulations “presented an obstacle” to the federal regulation’s choice to permit compliance via a variety of devices and allow the “gradual” phase-in of passive restraints. *Id.* at 881-82; *see also Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760, 765 (9th Cir. 1983) (holding that the Endangered Species Act and federal regulations promulgated to implement it preempted a California statute prohibiting a trader who had secured all necessary federal permits from selling certain products authorized by such permits).

The Draft CAO attempts to create an even more direct conflict. Unlike the regulations in *Geier*, federal law and FAA regulations offer CAL FIRE and the County no discretion—they must discharge AFFF for fire-fighting activities, and in the past for fire-fighting training and preparedness, at the Airport. 14 CFR § 139.317. The FAA has mandated the use of AFFF since 1972—before CAL FIRE began providing fire-fighting services at the Airport. *See* 37 Fed. Reg. 12,278 (Jun. 21, 1972). The required use of AFFF is a deliberate component of the regulatory program promulgated by the FAA to effectuate Congress’ intent to “ensure safety in air transportation.” 49 U.S.C. § 44706(b) (directing the FAA to establish operating terms for airports that include conditions related to “operating and maintaining adequate safety equipment, including firefighting and rescue equipment”).

The Draft CAO seeks to impose liability on CAL FIRE and the County pursuant to state law to address the PFAS in AFFF that federal law required CAL FIRE and the County to employ for life-saving fire-fighting operations to ensure the public’s safety at the Airport. Draft CAO ¶ 1. This direct conflict with federal laws and regulations preempts such liability and precludes the issuance of the CAO.

Indeed, the California Legislature has recognized the preemptive effect of the FAA regulations as reflected in SB 1044, which banned the manufacture, sale, and use of PFAS-containing fire-fighting foam starting on January 1, 2022. There, the Legislature specifically exempted from this prohibition the manufacture, sale, distribution, or use of PFAS-containing fire-fighting foam required to be used to comply with federal law requirements, including FAA regulations. In so doing, the Legislature recognized the preemptive effect of the FAA’s AFFF regulations and the prohibition against imposing liability under California law on airport operators and firefighters who comply with those regulations.

In addition, federal field preemption likewise precludes the Board from regulating or penalizing the use of AFFF in compliance with FAA regulations. The federal interest in interstate air travel safety and the federal regulation of interstate airport operations are so pervasive that they prohibit the Regional Board from regulating the same activities. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) (holding field preemption bars state law where there is “a framework of regulation ‘so pervasive . . . that Congress left no room for the States to

supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject’”) (citations omitted).

In sum, federal conflict and field preemption bar the imposition of liability on CAL FIRE and the County for complying with FAA regulations and precludes issuance of the CAO.

## **B. California Law Provides Immunity to CAL FIRE and the County for Fire-Fighting Activities.**

California Government Code Section 850.4 provides public entities, such as the County and CAL FIRE, with immunity “for any injury caused in fighting fires” or “resulting from the condition of fire protection or fire-fighting equipment or facilities.” Cal. Gov’t Code § 850.4. Courts have interpreted the scope of immunity under the statute broadly. *See, e.g., Razeto v. City of Oakland*, 88 Cal. App. 3d 349 (1979) (extending immunity under Section 850.4 to injuries or property damage occurring from the use of fire-fighting equipment outside the fire-fighting context, when vandals turned on a publicly-maintained fire hydrant causing damage to the plaintiff’s home).

The Draft CAO seeks to impose liability on the County and CAL FIRE solely as a result of their providing fire protection services at the Airport and their use of AFFF for fire protection and in fire-fighting equipment and facilities. Section 850.4 grants the County and CAL FIRE immunity for such activities and therefore bars the Draft CAO’s attempt to impose liability on the County and CAL FIRE for providing fire protection services at the Airport. Accordingly, immunity for public entities under state law bars the imposition of liability on CAL FIRE and the County, and precludes issuance of the CAO.

## **II. Ambiguities and Inaccuracies Undermine the Draft CAO’s Evidentiary Support, and May Complicate and Delay the County and CAL FIRE’s Public Health Response.**

The science and regulation of PFAS chemicals are rapidly evolving at both the federal and state level. The Expanded Private Well Sampling Report submitted by the County on February 28, 2023, after issuance of the Draft CAO, provided additional sampling data vital to understanding the impacts of PFAS on the groundwater underneath the Airport and the nearby water supply wells. These developments heighten the importance of providing clear and accurate information to the public. Left unaddressed, the Draft CAO’s misstatements undermine the evidentiary and legal support for the Draft CAO.

- **The Draft CAO does not identify the specific PFAS chemicals at issue.** Although thousands of different PFAS chemicals exist, the Order uses the terms “PFAS” and “AFFF wastes” (Exhibit 2) without providing specific definitions of either or identifying the particular PFAS chemicals that the Draft CAO seeks to address. Exhibit 3: Required PFAS Analytes and Target Reporting Limits lists nearly fifty different PFAS chemicals, many of which are not associated with AFFF. The lack of definitions of PFAS and AFFF wastes creates confusion by

failing to clarify for the public (and the County and CAL FIRE) which PFAS chemicals are potentially at issue, and also lacks legal support. To the extent that PFAS chemicals not associated with AFFF are impacting the soil and groundwater underneath the Airport, those PFAS chemicals did not result from the County and CAL FIRE's fire-fighting activities, and the CAO cannot compel the County and CAL FIRE to address them.

- **Paragraph 3(b) improperly refers to unidentified “other waste constituents of concern.”** Paragraph 3(b) asserts that the County and CAL FIRE's fire-fighting activities resulted in the discharge of “PFAS and other waste constituents of concerns.” Draft CAO ¶ 3(b). The Draft CAO does not identify the “other waste constituents of concern” or provide any evidence or legal or factual justification regarding the discharge of such “waste.” There is no evidence that the County and CAL FIRE's fire-fighting activities are responsible for other constituents of concern, including the known TCE contamination in the area. Accordingly there is no legal or factual basis for reference to other chemicals or “other waste constituents of concern.”
- **Paragraph 19(b) mischaracterizes CAL FIRE's relationship with the County and the Airport.** CAL FIRE has provided fire-fighting services pursuant to various Cooperative Fire Programs Fire Protection Reimbursement Agreements between CAL FIRE and the County. Throughout that time, the County has owned and maintained the Airport property and fire station. More importantly, throughout that time, federal law has mandated the use of AFFF at all airports. Accordingly, the use of AFFF at the Airport—including in the context of emergency response actions—is in compliance with federal law.
- **Paragraph 22 misstates the current status of treatment for the Buckley Road area.** The Draft CAO identifies that eleven wells in the Buckley Road area are equipped with granular activated carbon (“GAC”) wellhead treatment systems, but it fails to mention that twenty-eight wells are equipped with reverse osmosis (“RO”) treatment systems. Further, an additional two wells have been equipped with ion exchange point-of-use treatment systems for drinking water that were installed by the County and CAL FIRE on March 29 and 30, 2023, to address the only two locations (PW-12 and PW-39) identified in the Fall 2022 expanded private well sampling effort where drinking water samples reflected concentrations of PFAS that exceeded RLs.
- **Paragraphs 40 and 41 do not reflect the post-treatment sampling or the most recent sampling data for the Buckley Road area.** The Draft CAO misleadingly cites raw water sampling data without providing the post-treatment sampling data that more accurately reflects the detections of PFAS, if any, in drinking water. In fact, the post-treatment sampling data demonstrates the general effectiveness of GAC treatment and RO systems in removing PFAS from drinking water. Indeed,



the Fall 2022 expanded private well sampling effort sampled twenty-seven RO systems, and no sample collected downstream of an RO system contained PFAS at concentrations above notification levels (“NLs”) or RLs. The Fall 2022 investigation only identified two locations (PW-12 and PW-39) where drinking water contained concentrations of PFAS that exceed one or more RLs. As noted above, the County and CAL FIRE recently coordinated the installation of ion exchange point-of-use treatment systems for these users.

Several assertions in Paragraph 40 are also speculative and lack evidentiary and legal support. Paragraph 40 asserts that:

There are other unsampled supply wells in the area that likely have PFAS above health advisory levels. In April 2019, the State Water Board required public/community water system wells within two (2) miles of an airport (that accepted, stored, or used AFFF) be sampled for PFAS. Results of sampling water system wells in 2019 revealed the occurrence of PFAS in the vicinity of the Airport. Out of 26 wells serving public or community water systems in the vicinity of the Airport, approximately 88 percent of the wells had one or more detected PFAS, 77 percent had one or more PFAS with concentrations above NLs, and 58 percent had PFAS with concentrations above RLs, based on results reported in the GeoTracker Groundwater Ambient Monitoring and Assessment Program (GAMA) database.

These claims seem to suggest that the Airport may be associated with PFAS detections allegedly in the vicinity of the Airport collected as part of non-Airport investigations, including some locations where there are potential, if not likely, alternative sources. Such speculation cannot support the imposition of liability on the County and CAL FIRE.

Paragraphs 40 and 41 do not clarify the geographic scope of the potential PFAS impacts from fire-fighting operations at the Airport. To be clear, areas to the north and east of the Airport are upgradient and investigations so far have not indicated any PFAS exceedances in these locations resulting from AFFF use at the Airport. The lack of specific geographic scope and the lack of factual and evidentiary support regarding allegations of PFAS contamination in areas not associated with fire-fighting operations at the Airport renders the CAO legally and factually deficient.

- **Figure 5 and Paragraph 22(b) improperly cite summary PFAS sampling results without identifying the specific PFAS compound.** Sampling results that do not identify the specific PFAS compound fail to support the allegation that the reflected PFAS are associated with AFFF use at the Airport. (Such sampling results also cannot be compared to the applicable numerical limits. This is

especially important given the fact that numerous PFAS chemicals do not currently have numerical limits.)

- **Required Action No. 1 requires replacement for potable uses that do not have established exceedance levels, including cooking, showering, bathing, dishwashing, and flushing toilets, and other municipal, industrial, agricultural, and other use(s).** The Draft CAO purports to require replacement water for various activities, including, but not limited to, bathing, showering, dishwashing, and flushing toilets, where there is an exceedance of an RL or MCL (if an MCL exists). However, RLs and MCLs apply to drinking water—not the other uses listed in the Draft CAO. The Draft CAO does not provide a clear rationale for extending such standards to other domestic uses such as cooking, showering, bathing, dishwashing, and flushing toilets, and other municipal, industrial, agricultural, and any other use(s).
- **The term “replacement water” is vague and ambiguous.** The Draft CAO does not define the term “replacement water” and its use throughout the CAO is vague and ambiguous. The Draft CAO compounds this lack of clarity by referring separately to “interim replacement water,” “long-term replacement water,” and “replacement water system” without defining any of terms, clarifying the difference between them, or identifying the actions necessary to satisfy each of the different terms.
- **The Draft CAO does not clarify the status of the perched groundwater.** The perched groundwater presents discontinuously at the site and is not used for drinking water. As a result, the Draft CAO should clarify whether the perched groundwater has any present and potential beneficial uses under the Basin Plan and whether the Board envisions any remedial actions targeted at the perched groundwater.

## CONCLUSION

For the reasons stated above, and as reflected in the record, there is no merit to the Draft CAO’s attempt to impose liability on CAL FIRE and the County for providing fire protection and using fire-fighting equipment and facilities at the Airport, as immunized under state law, and the use of AFFF as is mandated by federal law. CAL FIRE urges the Regional Board to continue



to collaborate with the County and CAL FIRE on the current public health response already underway and to avoid further action on the Draft CAO. Please contact us with any questions.

Sincerely,



Sarah P. Bell

SPB

cc: Joe Tyler, Director, California Department of Forestry and Fire Protection  
Kelly Welchans, Chief Legal Counsel, California Department of Forestry and Fire Protection  
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